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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 75-899

UNIVERSITY OF DELAWARE,
Petitioner,

vs.

WILLIAM F. KEEGAN, ET AL.,
Respondents.

PETITION FOR REHEARING.

PETITIONER'S MEMORANDUM IN RESPONSE TO BRIEF IN OPPOSITION.

JOHN P. SINCLAIR,
POTTER, ANDERSON & CORROON,
350 Delaware Trust Building,
Wilmington, Delaware 19899,
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PHILIP B. KURLAND,
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This petition for rehearing is based on procedural deficiencies in the original consideration given our petition for certiorari. The facts are these:

1. A timely petition for certiorari was filed in this case on or about 23 December 1975, with service made on the attorneys; (1) for defendants in the court below; (2) for intervening defendants in the court below; and (3) for amicus curiae in the court below.

2. The attorneys for the defendants filed a timely response in opposition to the petition. That response rested largely on the proposition that this case was not ripe for review because of the lack of a final judgment.

3. Petitioner prepared and was ready to file its response to the brief in opposition, a copy of which is attached hereto, when it received an order from the Clerk of this Court, dated 28 January 1976, extending the time for the intervening defendants to file a brief in opposition to certiorari until 26 February 1976. (Copy attached as App. A.)

4. In light of this extension of time to file the brief in opposition, petitioner held up the filing of its reply brief until it could respond to both briefs in opposition.

5. On 23 February 1976, before the intervening defendants filed any brief in opposition—none has ever been filed—this Court entered its order announcing that the petition for certiorari had been denied, with two Justices dissenting and one Justice not participating. (Copy attached as App. B.)

6. Petitioner then addressed a letter under date of 25 February 1976, to the Clerk of this Court, with copies to all counsel, pointing out that the Court's action was precipitous in that it did not await the filing of intervening defendants' brief and precluded petitioner from filing a brief in reply to the brief in opposition filed by the defendants. (Copy attached as App. C.)

7. The Clerk replied by letter, dated 12 March 1976, with copies to all counsel, stating: "I have shown your letter to a Justice of this Court and he agrees with me that if you feel the petitioner has been prejudiced in any way you may bring the matter before the Court in a timely petition for rehearing." (Copy attached as App. D.) This is that petition.

Petitioner, therefore, respectfully requests that this Court vacate its order denying the petition for certiorari and order a rehearing on the petition after the Court has had opportunity to receive intervening-defendants' brief in opposition and petitioner's memorandum in reply.

Respectfully submitted,

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350 Delaware Trust Building,
Wilmington, Delaware 19899,
Attorney for Petitioner.

PHILIP B. KURLAND,
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(312) 372-2345),
Of Counsel.

CERTIFICATE OF COUNSEL.

The foregoing Petition for Rehearing is presented in good faith and not for purpose of delay.

.....

for Petitioner

PETITIONER'S MEMORANDUM IN RESPONSE TO BRIEF IN OPPOSITION.

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PETITIONER'S MEMORANDUM IN RESPONSE TO BRIEF IN OPPOSITION.

I. JURISDICTION.

Respondents seek to avoid review of the state court judgment on the ground that it "was not a final judgment capable of invoking this Court's jurisdiction under 28 U.S.C. § 1257." Keegan Brief in Opp., p. 5. There is no merit to this position. It rests entirely on the form rather than the substance of the Delaware Supreme Court's judgment. That court has, in fact, ruled on and made disposition of every question that was raised and contested in this case. Remand to the trial court can only be for the purpose of entering judgment in accordance with the state high court's decree. The judgment of the high court of Delaware is ripe for review and reversal by this Court.

This Court has long since decided that it would determine the question of finality of a state court judgment not by its

form but by its substance. The court below "has passed on the issues which control the litigation" and "there is nothing more to be decided." *Richfield Oil Corp.* v. *State Board,* 329 U. S. 69, 73-74 (1946); *Pope* v. *Atlantic Coast Line R. Co.,* 345 U. S. 379 (1953).

Petitioners sought relief below on two constitutional grounds. First, that a public university is precluded from providing facilities for religious worship services by the Establishment Clause of the First Amendment. Second, that the Free Exercise Clause does not compel a public university to provide facilities for religious worship services. The respondents took issue with both contentions and offered no other issues for resolution.

The Supreme Court of Delaware has ruled that the Establishment Clause permits the University to make available its facilities for the conduct of religious worship services and, indeed, that the Free Exercise Clause compels the University to do so. It has thus disposed of all the questions raised by the parties on a stipulated record and on cross motions for summary judgment. Petitioner makes and has made no contention that if the Free Exercise Clause compels the University to provide facilities for religious worship services there is a "compelling state interest" that excuses it from compliance. There is nothing in the record to suggest such a contention and Petitioner knows of nothing in law or fact to sustain such a position. Finality does not require the ministerial steps of remand to the trial court for entry of judgment, an appeal from that judgment to the state supreme court, where the issues would be res adjudicata, and, then, a petition to this Court for certiorari on exactly the same record and the same judgment as presented on this petition. Since the sole federal constitutional questions that have been raised have been resolved and are controlling of the outcome of the case, the judgment below has that finality required by 28 U. S. C. § 1257. See *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), and cases cited therein.

This case comes here with the constitutional issues in exactly the posture of *Board of Education* v. *Allen*, 392 U. S. 236 (1968); *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Hunt* v. *McNair*, 413 U. S. 734 (1973); *McCollum* v. *Board of Education*, 333 U. S. 203 (1948); *Sherbert* v. *Verner*, 374 U. S. 398 (1963); *Walz* v. *Tax Commission*, 397 U. S. 664 (1970); *Zorach* v. *Clauson*, 343 U. S. 306 (1952). The respondents should not be permitted to evade review of the state court's factitious decision on essential constitutional questions by introducing a fictitious issue raised by neither party, without data in the record, and without substance. It has already taken the case more than two years to be resolved by the two-tier judicial system in Delaware. The resolution of these questions should not be deferred further for the purpose of indulging formalities without substance, which would be the consequence of a denial of certiorari.

II. RESPONDENTS' SUBSTANTIVE ARGUMENTS.

The essence of the Respondents' argument is that religious activities are not to be treated differently from nonreligious activities. But the First Amendment compels distinct treatment for religious activities. It commands: (1) that the state may not support religious activities, and (2) that the state may not burden religious activities. The essence of Petitioner's case is that affording facilities for the conduct of religious worship services is support of religious activity, religious activity in its quintessential form, and that failure to supply such facilities does not burden religious activity.

It cannot be denied that the facts that would otherwise have invalidated the grants in question in *Tilton* v. *Richardson*, 403 U. S. 672, 680 (1971), are the facts on which the court below erroneously rested its judgment. In *Tilton*, the plurality opinion for this Court, said:

> The institutions presented evidence that there had been no religious services or worship in the federally financed facili-

> ties, that there are no religious symbols or plaques in or on them, and that they had been used solely for nonreligious purposes.

The court below has not only tolerated the use of state university facilities for "religious services or worship," it has commanded the state university to put its buildings to this use. The condition of non-religious use imposed in *Tilton*, was also the condition stated in *Hunt* v. *McNair*, 413 U. S. 734 (1973).

It cannot be that this Court's jurisprudence *forbids* the religiously affiliated colleges and universities involved in *Tilton* and *Hunt* to conduct religious worship services in buildings financed with federal or state assistance, but *commands* that buildings in a state university with exactly the same kind of support must be allowed to be used for the conduct of religious worship services. Certainly there is no rational basis for such a distinction.

The Court should issue the writ of certiorari to review and reverse the judgment below.

Respectfully submitted,

JOHN P. SINCLAIR,
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Wilmington, Delaware 19899,
Attorney for Petitioner.

PHILIP B. KURLAND,
ALAN L. UNIKEL,
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Chicago, Illinois 60603,
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Of Counsel.

APPENDIX A

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

January 28, 1976

James P. Collins, Esq.
Healy and Collins
1116 King Street
Wilmington, Delaware 19801

Re: University of Delaware v. William F. Keegan, et al., No. 75-899

Dear Mr. Collins:

Your request of January 26, 1976, for an extension of time within which to file a response to the petition for a writ of certiorari in the above-entitled case has been granted and the time has been extended to and including February 26, 1976.

The brief of the other respondents was filed on January 26, 1976.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: Philip B. Kurland, Esq.
Alren B. Mekler, Esq.
John S. Grady, Esq.

POOR COPY

APPENDIX B

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

FEB 23 1976

Philip B. Kurland, Esq.
Rothschild, Barry & Myers
Two First National Plaza
Chicago, IL 60603

RE University of Delaware v. KEEGAN, et al., 75-899

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case. Mr. Justice Brennan and Mr. Justice Blackmun would grant certiorari. Mr. Justice Stevens took no part in the consideration or decision of this petition.

Very truly yours,

Michael Rodak, Jr., Clerk
By
Helen Taylor
Helen Taylor (Mrs.)
Assistant Clerk

cc: James P. Collins, Esq.
Collins & Healey
1116 King St.
Wilmington, Del. 19801

Arlen B. Mekler, Esq.
Wise & Mekler
502 Market Tower
Wilmington, Del. 19801

POOR COPY

Registered Mail APPENDIX C

February 25, 1976

Dear Mr. Rodak:

It came with some surprise, to say the least, to learn that the Court on Monday last passed on the petition for certiorari in No. 75-899, University of Delaware v. William F. Keegan, et al. On 29 January 1976, we received a copy of an order from this Court extending the time of some respondents to file their brief in opposition until 26 February 1976. A xeroxed copy of that notice is attached hereto. We, therefore, refrained from filing our reply brief until after the briefs of respondents were to be filed. Prior to the time that the respondents' briefs were due, however, the Court denied the petition. Certainly this is not consistent with the practice prescribed by the rules of this Court.

Very truly yours,

Philip B. Kurland

PBK:jd
w/enclosure

Mr. Michael Rodak, Jr.
Clerk of the Court
United States Supreme COurt
Washington, D.C. 20543

CC: John P. Sinclair
Arlen B. Mekler
James P. Collins
John S. Grady

POOR COPY

APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

March 12, 1976

Philip B. Kurland, Esq.
Two First National Plaza
Chicago, Illinois 60603

Re: University of Delaware v. William F. Keegan, et al., No. 75-809

Dear Mr. Kurland:

In reply to your letter of February 25, 1976, I regret that you were unable to file a reply brief in the above-entitled case on behalf of the petitioner.

I have shown your letter to a Justice of this Court and he agrees with me that if you feel the petitioner has been prejudiced in any way you may bring the matter before the Court in a timely petition for rehearing.

Very truly yours,

Michael Rodak, Jr.
Clerk

cc: John P. Sinclair, Esq.
Arlen B. Mekler, Esq.
James P. Collins, Esq.
John S. Grady, Esq.

AIR MAIL

POOR COPY